Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Connect America Fund	)	WC Docket No. 10-90
A National Broadband Plan for Our Future	)	GN Docket No. 09-51
Establishing Just and Reasonable Rates for Local Exchange Carriers	)	WC Docket No. 07-135
High-Cost Universal Service Support	)	WC Docket No. 05-337
Developing an Unified Intercarrier Compensation Regime	)	CC Docket No. 01-92
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
Lifeline and Link-Up	)	WC Docket No. 03-109

To: The Commission

COMMENTS OF THE BEEHIVE TELEPHONE COMPANIES

Beehive Telephone Co., Inc. and Beehive Telephone Co. Inc. Nevada (jointly "Beehive"), by their attorney, hereby submit their comments on the Commission's proposed rules to reduce so-called "access stimulation" as set forth in § XV.C of its Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, FCC 11-13, released on February 9, 2011 ("NPRM").

INTRODUCTION

Beehive is one of the nation's smallest local exchange carriers. It was established in 1963 to bring telephone service to remote areas in Utah and Nevada. Beehive's subscribers are in tiny villages scattered throughout parts of nine Utah counties and two counties in Nevada.

Beehive once terminated traffic to Joy Enterprises, Inc. ("JEI") with whom it had what the Commission now calls an "access revenue sharing agreement." That agreement or arrangement was the subject of a formal complaint by AT&T and three tariff investigations.[1] After a six-year investigation, the Commission held that AT&T had failed to demonstrate that Beehive's access revenue sharing arrangement with JEI violated the Act.[2] Hoping to avoid complaints by interexchange carriers ("IXCs") and Commission investigations, Beehive not only ceased access revenue sharing with JEI, but it stopped terminating traffic to any entity that could be considered a "high call volume operation."[3] To that end, Beehive assisted All American Telephone Co., Inc. ("AATCO") in obtaining authorization to provide access service to JEI.

Beehive cancelled its interstate access tariff and entered the NECA pool effective June 30, 2007, which was foresighted considering that six weeks later the Wireline Competition Bureau ("Bureau") recognized the NECA pool as a "safe harbor" wherein carriers would not be subject to access stimulation claims.[4] At that time, Beehive thought that it would no longer have to face "traffic pumping" allegations: it was not engaged in access revenue sharing; it had not included any access revenue sharing payments in its interstate switched access revenue

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[1] In its 1996 formal complaint, AT&T alleged Beehive's access revenue sharing arrangement with JEI violated §§ 201(b) and 202(a) of the Communications Act of 1934 ("Act"). While its complaint against Beehive was being litigated, AT&T petitioned the Commission to investigate Beehive's July 1997 access tariff filing. This led to the first of three Commission tariff investigations in which AT&T challenged Beehive's revenue sharing arrangement with JEI. *See Beehive Telephone Co., Inc.*, 13 FCC Rcd 2736, 2739, *modified on reconsideration,* 13 FCC Rcd 11795 (1998), *aff'd, Beehive Telephone Co., Inc. v. FCC,* 180 F.3d 314 (D.C. Cir. 1999); *Beehive Telephone Co., Inc.,* 13 FCC Rcd 12275, 12282, *reconsideration denied,* 13 FCC Rcd 19396 (1998); *Beehive Telephone Co., Inc.,* 14 FCC Rcd 1224, 1231 (1998), *reconsideration denied,* 14 FCC Rcd 5456, *reconsideration granted sua sponte,* 14 FCC Rcd 8077 (1999).

[2] The Commission concluded the AT&T formal complaint proceeding in 2002. By that time, the Commission's record not only included the facts that AT&T had acquired in discovery, but the facts that had been obtained by the Commission in its investigation of Beehive's July 1997 tariff filing. Based on that consolidated record, the Commission held that AT&T had failed to show that Beehive's revenue sharing arrangement with JEI violated either § 201(b) or § 202(a) of the Act. *See AT&T Corp. v. Beehive Telephone Co., Inc.*, 17 FCC Rcd 11641, 11655 (2002).

[3] NPRM at 205 (¶ 636).

[4] *See Investigation of Certain 2007 Annual Access Tariffs,* 22 FCC Rcd 16109, 16120 (WCB/Pricing 2007). *See also* NPRM at 211 (¶ 656).

requirement; it only provided the tandem switched transport portion (tandem switching, tandem switched facility, and tandem switched termination) of the access service that was provided to JEI and other high-call-volume operations; it provided such service as permitted by § 2.4.7 of NECA's Tariff F.C.C. No. 5 ("NECA 5") and charged the tandem switched transport rates set forth in § 17.2.2 of that tariff; and it had no incentive to engage in access stimulation, since the revenues generated by elevated traffic volumes would have to be shared with the other members of the NECA pool.[5] Beehive's sense of security turned out to be unwarranted.

Despite concluding in August 2007 that Beehive was no longer terminating traffic to a conference call, chat line or similar service provider, Sprint Nextel Corporation ("Sprint") nevertheless decided in September 2007 that Beehive was engaged in access stimulation and, therefore, it would stop paying any of Beehive's tariffed access charges. The decision to engage in self-help was based on nothing more than Sprint's assumption that, because of Beehive's "past practices," it had to be making "switched access revenue kickbacks" to a free service provider to generate traffic. That entirely false assumption ultimately led the parties to a federal district court in May 2008, where Beehive is still struggling to collect approximately $2.6 million in unpaid access charges from Sprint.[6]

Beehive is embroiled in one of the 25 collection suits that are now in federal courts — or in the courts and the Commission under the doctrine of primary jurisdiction — as a result of the strategic decision of the IXCs to defend federal court collection suits rather than pursuing their access stimulation claims before the Commission. That strategy has allowed IXCs to bewilder

[5] *See* Comments of the National Exchange Carrier Association, Inc., WC Dkt. No. 07-135, at 3 (Dec. 17, 2007) ("NECA Comments").

[6] *See Beehive Telephone Co., Inc. v. Sprint Communications Co., LP,* No. 2:08-cv-00380 (D. Utah filed May 15, 2008); *Beehive Telephone Co., Inc. v. Sprint Communications Co., LP,* No. 2:10-cv-00052 (D. Utah filed Jan. 25, 2010).

non-expert federal judges with prejudicial and outlandish claims that could not be made before the expert agency with exclusive jurisdiction to determine whether a carrier's charges and practice are just and reasonable.

For example, Sprint successfully opposed Beehive's motion to have the issues referred to the Commission by making the specious claim that the court could decide the case based on a "straightforward application" of the Commission's second order on reconsideration in the *Farmers* case.[7] Because its decision in *Farmers* turned on the facts that showed that Farmers did not structure its relationships with the conference calling companies in a manner consistent with the Keisling Tariff,[8] the Commission would immediately recognize that *Farmers* has no application to the AATCO-Beehive meet point arrangement, or whether Beehive provided the tandem portion of the access service to its customer — Sprint — in accordance with §§ 2.4.7 and 5.3.2 of NECA 5. And the Commission would clearly see that *Farmers* will not aid in the determination of whether AATCO provided local switching in accordance with its interstate access tariff. That would be clear to the Commission but it mystified a federal trial judge.

By asking federal judges to decide whether carriers are engaged in access stimulation and, if so, whether it is an unjust and unreasonable practice, the IXCs have engendered expensive, protracted litigation that often entails a primary jurisdiction referral to the Commission.[9] The Commission can break the present logjam of collection suits in federal court

[7] *Qwest Communications Corp. v. Farmers and Merchants Mutual Telephone Co.*, 24 FCC Rcd 14801 (2009), *reconsideration denied*, 25 FCC Rcd 3422 (2010), *petition for review docketed, Farmers and Merchants Mutual Telephone Company of Wayland, Iowa v. FCC*, No. 10-1093 (D.C. Cir. May 7, 2010).

[8] *See id.*, 25 FCC Rcd at 3426.

[9] Beehive transported interstate calls to the three Utah CLECs — AATCO, e-Pinnacle Communications, Inc. and ChaseCom — that sued AT&T for unpaid tariffed access charges. *See All American Telephone Co., Inc. v. AT&T Corp.*, No. 1:07-cv-00861-WHP (S.D.N.Y. filed Feb. 5, 2007). Issues in the AATCO collection suit were twice referred to the Commission under the

by exercising its primary jurisdiction and its expertise by adopting the proposed access stimulation rules (with minor modifications) on an expedited basis. Deference to those rules will guide the federal courts in bringing the collection suits to judgment.

DISCUSSION

A referral from the court hearing the AATCO collection suit produced a Commission ruling that neither an IXC's failure to pay tariffed access charges nor its failure to challenge the tariffed access rates before the Commission violates a provision of the Act.[10] Furthermore, the Commission held that a carrier's allegation that its customer-carrier failed to pay tariffed access charges does not give rise to a claim for a breach of the Act itself either in court under § 206 of the Act or to the Commission under § 208.[11] The Commission's reading of the Act is correct, but the unfortunate results of its decision in *AATCO* will be to effectively legitimize IXC self-help, allow the IXCs to withhold payment of access charges with relative impunity, free IXCs to continue to coerce LECs into make unlawful rebates, and ultimately force more litigation on the federal district courts. That being the case, the Commission owes it to the unpaid LECs and the courts to promulgate access stimulation rules that will both provide clear and explicit guidelines for the courts to apply and afford the LEC plaintiffs a fair opportunity to collect their unpaid access charges. To that end, Beehive offers the following two general suggestions.

1. Revise the Definition of "Access Revenue Sharing." The Commission's proposed rules are to be "triggered" based on the existence of "access revenue sharing arrangements" or

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primary jurisdiction doctrine. *See All American Telephone Co., Inc. v. AT&T Corp.*, 2009 WL 691325 (S.D.N.Y. Mar. 16, 2009); *All American Telephone Co., Inc. v. AT&T Corp.*, No. 1:07-cv-00861-WHP (S.D.N.Y. Feb. 5, 2010).

[10] *See All American Telephone Co., Inc. v. AT&T Corp.*, 26 FCC Rcd 723, 724 (2011) ("*AATCO*").

[11] *See id.* at 727.

"access revenue sharing agreements."[12] Thus, those terms, or either one of them, are key. Yet, the Commission proposed new rules do not include a definition of either term. The Commission proposes only to define "access revenue sharing" and the term is ill-defined and will invite litigation.[13]

The proposed definition of access revenue sharing includes four undefined or ambiguous terms: "rate-of-return ILEC," "access revenue sharing agreement," "affiliates," and "revised interstate switched access charge rules."[14] The term "rate-of-return ILEC" will exclude rate-of-return LECs. Moreover, "rate-of-return ILEC" is not defined. The Commission clearly intends that term will encompass the LECs that participate in the NECA pool. To that extent, the Commission's definition will be overinclusive.

Beehive does not understand why a LEC that is engaged in access revenue sharing would join the NECA pool and have to share the revenues generated with other pool members. For the same reason, Beehive sees no reason why a LEC in the NECA pool would commence access revenue sharing. Nevertheless, citing the comments of NECA and a state commission, the Commission finds that access stimulation by a NECA pool member is unlikely, but "not necessarily precluded."[15] However, NECA and the Ohio PUC agreed only that NECA pool members have "little or no incentive" to engage in access stimulation.[16] Verizon effectively argued that a NECA pool member would be precluded from engaging in access stimulation by

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[12] NPRM at 212 (¶ 659).

[13] *Id.* at 241 (proposed § 6.3(aaa)).

[14] *Id.* Instead of including the phrase "revised interstate switched access charge rules," Beehive suggests that the rule cite to the specific sections of Parts 61 and 69 that would be "triggered."

[15] *Id.* at 213 (¶ 662) & n.1032 (citing NECA Comments at 3; Comments of the Public Utilities Commission of Ohio, WC Dkt. No. 07-135, at 4 (Dec. 14, 2007) ("Ohio PUC Comments"))

[16] NECA Comments at 3; Ohio PUC Comments at 4.

proposing that LECs whose demand increases by more than 25% in a quarter ("illegitimate traffic pumping behavior") be required to enter the NECA pool.[17] The Commission should find either that a NECA pool member has engaged in access stimulation or that there is a substantial likelihood that a member will engage in access stimulation before subjecting the NECA pool to its new access stimulation rules.

Defining "access revenue sharing" as occurring when a LEC or CLEC enters into an "access revenue sharing agreement" is both circular and overinclusive. The term "access revenue sharing agreement" would encompass a meet point billing arrangement under which access service is provided by two LECs. For example, NECA § 2.4.7(B)(1)(a) authorizes single bill/multiple tariff, meet point billing which permits the "bill rendering company" to bill the customer, receive payment, and remit payment to the other carrier in accordance with its tariff. Yet, that meet point billing arrangement would "trigger" the Commission's new access stimulation rules because it would constitute an "access revenue sharing agreement that will result in a net payment to the other party (including affiliates) to the access revenue sharing agreement, over the course of the agreement."[18] Of course, there is no evidence that meet point billing arrangements commonly are used to facilitate access stimulation activity.

To order avoid uncertainty and to provide clear guidance to the courts and litigants, the Commission should adopt another term to trigger its new rules and narrowly tailor its definition to apply only to access revenue sharing arrangements that are for the purpose of collecting unreasonably high terminating access charges and earning an excessive rate of return.

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[17] Comments of Verizon in Response to Notice of Proposed Rulemaking, WC Dkt. No. 07-135, at 13 (Dec. 17, 2007).

[18] NPRM at 241 (proposed § 6.3(aaa)).

2. Clearly Define a "Sham Arrangement." The Commission adopted a "sham arrangement" exception to its ban on call-blocking in *Total Telecommunications Services, Inc. v. AT&T Corp.*, 16 FCC Rcd 5726 (2001), *aff'd in part and remanded sub nom., AT&T Corp. v. FCC*, 317 F.3d 227 (D.C. Cir. 2003). In *Total,* the FCC found that an ILEC had formed and funded a competitive access provider that was under common management "as a sham entity designed to impose increased access charges on calls" to a free chat-line service,[19] thereby permitting the ILEC "to charge indirectly, through [the] sham arrangement, rates that it could not charge directly through its existing tariff."[20] IXCs have sought to avoid paying access charges by alleging that they were the product of a "sham arrangement" under circumstances far removed from those condemned in *Total.*

AT&T misused the "sham entity" exception when it gave Beehive as an "early example" of the phenomenon whereby ILECs apparently create "CLEC subsidiaries through which they implement their pumping schemes."[21] Noting that three CLECs operated in Beehive's service territories, AT&T insinuated, "Given the paucity of legitimate subscribers in Beehive's operating area. It comes as little surprise that evidence suggests these 'competitive' carriers have ties to the ILEC; for example, the attorney who incorporated one of the CLECs is a director of Beehive."[22] The fact that an attorney who sat on Beehive's board rendered legal services to AATCO does not suggest Beehive created AATCO so that it could charge indirectly, through AATCO, rates that it could not charge directly under NECA 5.

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[19] *Total*, 16 FCC Rcd at 5732.

[20] *Id.* at 5734.

[21] Comments of AT&T, Inc., WC Dkt. No. 07-135, at 11 & n.14 (Dec. 17, 2007).

[22] *Id.* at 11 n.14.

The fact of the matter is that Beehive assisted AATCO in obtaining regulatory approval necessary to commence operations, because it served Beehive's interest in severing its ties to JEI. Once AATCO commenced CLEC operations by providing the local switching necessary to terminate traffic to JEI, the onus was on AATCO to provide that access service to JEI in accordance with its interstate access tariff. Furthermore, by benchmarking to Beehive, AATCO charged the exact same rate for local switching that Beehive would have under NECA 5. Because AATCO billed the NECA 5 rate for local switching and Beehive billed the NECA 5 rates for tandem switching, tandem switched facility, and tandem switched terminations, IXCs were charged exactly the same rates that they would have been charged by Beehive in the absence of AATCO. And since the IXCs paid AATCO directly, Beehive received less access revenue that it would have absent AATCO's CLEC operations.

Despite the foregoing facts, and without evidence of an affiliation between Beehive and AATCO, Sprint is in court charging that AATCO is a "sham entity," established as a CLEC solely for the purpose of extracting exorbitantly high access for traffic to JEI. To prevent Sprint and other IXCs from burdening the courts with such baseless accusations, the Commission should fashion an LEC-CLEC cross-ownership ban that mirrors the "sham arrangement" exception that the Commission adopted in *Total*.

CONCLUSION

Beehive urges the Commission to take an even-handed approach to the problem of access stimulation, taking care not to prejudice unpaid LECs in the eyes of the courts. The fact that the Commission has knowingly permitted the practice of access revenue sharing to continue for more than a decade, and is still unwilling to declare access stimulation to be *per se* unjust and unreasonable,[23] attests to the fact that access stimulation is not a "scam" perpetrated on IXCs or their customers. When it hears Sprint mischaracterizing access stimulation as "a fraudulent scheme to steal millions of dollars" from it and other IXCs,[24] the Commission must bear in mind that Sprint does not pay the access charges of carriers it even suspects are engaged in access stimulation. For example, Beehive calculated that between August 21, 2007 and July 20, 2009, calls placed by Sprint's customers were transmitted across Beehive's network for approximately 83.5 million access minutes. Those calls, for which Sprint self-righteously refuses to pay access charges, generated an estimated $9.4 million in revenues for Sprint. Under such circumstances, the Commission should address the issues with care so as not to lend any credence to such baseless and unduly prejudicial accusations as voiced by Sprint.

Respectfully submitted,

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[23] *See* NPRM at 213 (¶ 661).

[24] Letter from Michael B. Fingerhut to Marlene H. Dortch, WC Dkt. No. 07-135, at 1 (Apr. 29, 2009).